

Rule 15, Ariz. R. Crim. P.

EVIDENCE — DISCOVERY — *BRADY* – Prosecutor’s duty to disclose exculpatory evidence under *Brady* includes duty to disclose evidence impeaching credibility of witnessesRevised 11/2009

Because the defense has a due process right to a fair trial, the prosecution has an affirmative duty to disclose material exculpatory evidence to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence impeaching prosecution witnesses, as well as evidence directly exculpating the defendant, falls within the *Brady* rule and must also be disclosed to the defense. *United States v. Bagley*, 473 U.S. 667, 674-675 (1985). This is so because such evidence, if disclosed and used effectively, may make the difference between conviction and acquittal. *Id.* at 676; see also *Giglio v. United States*, 405 U.S. 150, 154 (1972) (“When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general [*Brady*] rule.” [Internal quotation marks omitted]); *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 238-39, 836 P.2d 445, 451-52 (App. 1992).

Specifically, the State must disclose to the defense any benefits the State has provided to its witnesses, as well as any agreement the State has made with any witness. *State v. Lukezic*, 143 Ariz. 60, 66, 691 P.2d 1088, 1094 (1984). In *Lukezic*, the prosecution failed to disclose assistance given to one prosecution witness, including assisting him and his family to make car payments and arranging for him to receive two addictive prescription drugs while in jail. *Id.* at 63-64, 691 P.2d at 1091-92. In addition, the State failed to disclose that the State had assured two prosecution witnesses that they would receive specific lenient sentences in return for their testimony. *Id.* at 64-65, 691 P.2d at 1092-93. The witnesses’ presentence reports contained fictitious names and addresses to protect the

witnesses' new identities under the witness protection program. *Id.* at 65, 691 P.2d at 1093. The presentence reports also falsely stated their criminal and mental health histories. These changes were made to assure that they would receive the lenient sentences they had been promised, and the sentencing judges relied on those false presentence reports in making their sentencing orders. *Id.* at 66, 691 P.2d at 1094. On appeal, the State argued that the prosecutors had not read the presentence reports and were not aware of the alterations. However, the Arizona Supreme Court found that the prosecution had a duty under Rule 15.1(d) [now 15.1(f)] to investigate information known to other persons, including the probation officers, other prosecutors within the office, and the police. *Id.* at 67, 691 P.2d at 1095. The Court said, "Although there may be circumstances where it would be unfair to the prosecution to require disclosure of *Brady* information not known to the prosecution, we are persuaded that it is not unfair in this case," reasoning that "the prosecution has a duty to inquire into the material benefits state witnesses have received from the state." *Id.* The Court said, "A prosecutor's office cannot get around *Brady* by keeping itself in ignorance or compartmentalizing information about different aspects of a case." *Id.* (citing *Carey v. Duckworth*, 738 F.2d 875 (7th Cir. 1984)).

The Court believed that "the state cannot plead ignorance of the conferral of this benefit." *Id.* The *Brady* violation required a new trial. The Court concluded:

In affirming this order for a new trial, we feel compelled to express our disapproval of the conduct of the prosecution in this case. Whether these witnesses received benefits due to prosecutorial design or inexcusable neglect is immaterial, because the prosecution is to blame in either case. We certainly do not subscribe to the cavalier philosophy that the state can do no evil when acting in the name of the good.

Id.